SUPREME COURT, U. S.

JUL 28 1975

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In The

Supreme Court of the United States

October Term, 1975

No. 75-155

JAMES V. LARKIN, DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, ET AL.,

Petitioners,

vs.

JOHN R. PATTERSON, NEWSPAPER AND MAIL DELIVERERS UNION OF NEW YORK AND VICINITY, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NEW YORK DAILY NEWS, NEW YORK TIMES, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975 - NO. 74

----------X

JAMES V. LARKIN, DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, ET AL.,

PETITIONERS,

-AGAINST-

JOHN R. PATTERSON, NEWSPAPER AND MAIL DELIVERERS UNION OF NEW YORK AND VICINITY, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **NEW YORK DAILY NEWS, NEW YORK TIMES, ET AL.,**

RESPONDENTS.

----------X

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, JAMES V. LARKIN, DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 20, 1975.

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Opinions Below

The opinion of the Court of Appeals reported at 514 F.2d 767 (2nd Cir. 1975) is reprinted in the appendix hereto at 1a. The order of the Court of Appeals denying petitioners' petition for rehearing, unreported, is reprinted in the appendix at 44a. The opinion, order and judgment of the United States District Court for the Southern District of New York, reported at 384 F.Supp. 585 (S.D.N.Y. 1974) is reprinted in the appendix at 21a.

Jurisdiction

The judgment of the Court of Appeals was entered on March 20, 1975. Petitioners' timely petition for a rehearing was denied on April 29, 1975. Jurisdiction is invoked under 28 U.S.C. Section 1254(1).

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QUESTIONS PRESENTED:

1. In an action based on Title VII, where both minority and non-minority workers are subjected to identical employment discrimination, is a District Court prohibited from granting equal relief to all discriminatees, regardless of race?

2. Whether Congress intended through Title VII to grant constructive seniority to newly hired minority individuals to the detriment of incumbent non-minority employees?

CONSTITUTIONAL PROVISION INVOLVED:

United States Constitution, Amendment V provides:

> ...nor shall any person...be deprived of life, liberty or property, without due process of law;...

STATUTORY PROVISIONS INVOLVED:

The sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. as amended, provides in pertinent

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part:

"Section 703(a), 42 U.S.C. 2000e-2(a): It shall be an unlawful employment practice for an employer -
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;"

"Section 703(c), 42 U.S.C. 2000e-2(c): It shall be an unlawful employment practice for a labor organization -

(1) To exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) To limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin.

Section 703(j), 42 U.S.C. 2000(e)-2(j): Nothing contained in this sub-chapter shall be interpreted to require any employer, employment agency, labor organization or joint labor management

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committee subject to this sub-chapter to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons or any race, color, religion, sex, or national origin employed by any employer..."

STATEMENT OF THE CASE:

This action is a consolidation of two suits filed in the Southern District of New York. The first was brought by minority employees of the various publishers (New York Times, New York Daily News, etc.). The second was brought by The Equal Employment Opportunity Commission (4a).

The petitioners are white, non-union workers who were given permission to intervene in the consolidated action as a matter of right (4a). A four week trial was held, however, before the cause could go to verdict, plaintiffs and defendants executed a settlement agreement which was subsequently approved by the District Court over the objection of

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the petitioners (3a).

The only act of discrimination found by the District Court was the Union's nepotistic admission policy (29a).

Both the District Court (35a) and the Court of Appeals (8a) have concluded that the Petitioners have been subjected to identical discriminatory treatment as minority employees. Consequently, the discriminatory employment practices uniformly affected all non-union individuals. Sons of union men, be they black or white, were given preferences over all other workers (30a). The Court's jurisdiction, having been invoked pursuant to Title VII, what petitioners requested below, was the same employment related relief that was granted to minority workers (40a). It should be noted that petitioners neither sought back pay nor challenged the remedial quota system of entry level hiring. Yet, the District Court (40a)

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and the Court of Appeals (11a) have refused to grant non-minority employees equal relief. The Courts reasoned, that a Title VII action need only be beneficial to minorities, notwithstanding the fact that similarly situated non-minority workers had suffered equally. Additionally, the Court has sanctioned a plan which grants constructive seniority to newly hired minorities (12a). These new minority employees need never have worked a day in the industry, yet as a result of this judicially approved plan, they will be given the right to be hired before incumbent non-minority employees with as much as ten years seniority (13a).

In order to assure a variable, yet constant work force, the hiring system at the publishers evolved into two categories (5a). The first category includes employees who fill the daily minimum work force requirements of

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the publishers. These positions are termed "Regular Situations" (5a). The second, the daily "shapers" are categorized into four employment priority groups (5a). Although called "extras", these employees must work five shifts per week, or be available to work six shifts per week in order to maintain their position on the employment priority lists (6a).

The order in which daily "shapers" are hired is determined in accordance with their position on a given employment priority list. These daily "shapers" are needed due to the variations in the size and quantity of the newspapers distributed. In addition, the various employment priority lists are used to determine who will receive the next available "Regular Situations (6a).

While the annual vacancy rate for "Regular Situations" is nominal, these employment priority lists are utilized to fill the

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thousands of "extra" or "shape" positions available yearly. For example, at the New York Daily News, the projected annual turnover of "Regular Situations" is 53 positions, whereas more than 50,000 extra shifts of work are filled each year.

It follows that the employee's position on any given employment priority list determines his hiring status. Consequently, if there are 100 jobs to be filled at a shift, the first 100 qualified men on the employment priority list would be hired.

The court-approved settlement agreement has resulted in the restructuring of the employment priority lists. This allows newly hired minority employees to jump over workers who in addition to having seniority in the industry, have throughout their employment suffered the effects of the nepotistic practices of the union.

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REASONS FOR GRANTING THE WRIT

I

I. THE PETITION PRESENTS AN IMPORTANT UNRESOLVED ISSUE CONCERNING THE RIGHTS OF NON-MINORITY WORKERS AFFECTED BY AN AFFIRMATIVE ACTION PROGRAM UNDER TITLE VII.

A. There is a conflict in the decisions of the Circuit Courts regarding the nature of remedies available under Title VII. The Petitioners seek a review of the opinion of the Second Circuit which is contra with that of the Sixth Circuit in *United States v. Roadway Express, Inc.*, 457 F.2d 854 (6th Cir. 1972), concerning the denial of equal relief to white workers. Further, the ruling in the Second Circuit on constructive seniority cannot be reconciled with the holdings in the Fifth and Seventh Circuits on this issue. *Franks v. Bowman Transportation Company, Inc.*, 495 F.2d 398 (5th Cir.

1974), *cert. granted*, 43 U.S.L.W. 3515, (March 24, 1975); *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. filed* February 21, 1975, O.T. 1974 No. 74-1064.

The underlying premise of Title VII is that the Federal Judiciary, using its broad equitable powers should fashion relief to eliminate the discriminatory effects of prior practices. Both the District Court and the Court of Appeals felt compelled, as a matter of law, to seek complete relief only for minority workers. Apparently disregarding equitable principles, the Court concluded that the Civil Rights Act was intended to remedy only the plight of minorities, thereby excluding white discriminatees from Title VII relief (11a, 40a).

In *United States v. Roadway Express, Inc.*, *supra*, the Sixth Circuit determined that all

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workers who have been the victims of discrimination, be they black or white, must be recompensed equally. Although the Second Circuit was cognizant of the decision in *United States v. Roadway*, the Court refused to follow the precedent contained therein (12a).

The equitable principles adopted in *Roadway*, have recently been set forth by this Court in *Albemarle Paper Company v. Moody*, -U.S.- (1975), an employment discrimination case:

> "It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secure[e] complete justice," *Brown v. Swann*, 10 Pet. 497, 503; see also *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-398. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 684.

Albemarle Paper Co., Slip Opin. at 11.

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B. The rightful place theory of relief has been approved by several Circuits. See, e.g., *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971); *Local* 189, *United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). This remedy allows an incumbent minority discriminatee to achieve employment standing consistent with work experience. In applying this theory, the Courts have been careful to oppose any "leap-frogging," "jumping," "bumping," or other constructive seniority approaches which would violate the rights of non-minority workers. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *United States v. Sheet Metal Workers, Local* 36, 416 F.2d 123 (8th Cir. 1969); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971) *cert. denied*, 406 U.S. 906 (1972); *United States v. Bethlehem Steel*

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Corp., supra; Waters v. Wisconsin Steel Works of International Harvester Co., supra.

The Second Circuit acknowledged that there would be "leap-frogging" of newly hired minority employees over incumbent white workers (13a). Nevertheless, the Court avoided the issue of constructive seniority claiming that the "leap-frogging" is not *"court ordered"* (14a). However, the Second Circuit failed to recognize that the District Court did enter an "order" (with findings of fact and conclusions of law) approving the settlement agreement (22a, 26a).

In the instant case, the sole act of discrimination was the Union's nepotistic policies which affected all non-union employees (29a, 35a). We are not dealing with prejudicial tests, referral systems, or transfer plans, but rather with an across-the-board discrimination in favor of the sons of union members, be they

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black or white. The discrimination here was genetic. Having established that the non-minority workers were equally the victims of unfair treatment, certainly, the Court's imposition of fictional seniority to their detriment cannot be sanctioned.

The rightful place theory was never intended to be a vehicle for racial discrimination.

II

II. THE LEGISLATIVE HISTORY OF TITLE VII DOES NOT SUPPORT THE CONSTRUCTION OF THE COURT BELOW.

The legislative purpose underlying Title VII of the Civil Rights Act was clearly to eradicate all vestiges of employment discrimination. Proponents of the Act vehemently argued that the Bill would not have an adverse affect on legitimate seniority rights of incumbent employees.

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In a detailed Interpretative Memorandum submitted to the Senate, it was stated:

> "Title VII would have no effect on established seniority rights. Its effect is perspective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all white working force, when the Title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged - or indeed - permitted - to fire whites in order to hire negros, or to prefer negros for future vacancies, or once negros are hired, to give them special seniority rights at the expense of the white workers hired earlier." 110 Cong. Rec. 7213 (1964) (Clark-Case Interpretative Memorandum)

During the debate, the Congressional Record was replete with statements assuring all legislators that the Civil Rights Act was remedial and not racist. It was to serve as a new foundation to insure equal rights for all citizens. Senator Hubert Humphrey, a leading supporter of the bill, argued:

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> "Contrary to the allegations of some opponents of this Title, there is nothing in it that will give any power to the Commission or to any other Court to require hiring, firing or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance." 110 Cong. Rec. 6549 (1964).

Addressing himself to specific questions concerning the Civil Rights Act, the Bill's sponsor, Senator Clark noted that:

> ". . . the Commission has a clear mandate to engage in wide-spread educational and promotional activities to encourage understanding and acceptance of the Act, *including the obligation not to discriminate against whites.*" 110 Cong. Rec. 7218 (1964) (emphasis added)

The racial limitation imposed by the Second Circuit in formulating relief under Title VII would only serve to defeat the intentions of its legislative advocates. By approving a system of racially motivated constructive seniority and by denying petitioners the right to equal relief, the Court below

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has vitiated the salutory effects of the Civil Rights Act.

III

III. THE PETITIONERS HAVE BEEN DENIED THEIR CONSTITUTIONAL RIGHT OF EQUAL PROTECTION UNDER THE LAW.

The Fifth Amendment prohibits Congress from passing discriminatory legislation which amounts to a denial of due process. The due process clause mandates that a law must be reasonable and operate equally upon all who are similarly affected. See, e.g. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

In the instant case, the record clearly shows that all non-union employees were equally mistreated (35a). It is respectfully submitted that both the District Court and the Court of Appeals, having erroneously construed Title VII, denied relief to similarly situated white workers, thereby depriving them of their Fifth

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Amendment rights. The greatness of America stems from the concept of equal protection under the laws for every person on an individual basis.

Injustice cannot be remedied by injustice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 626—September Term, 1974.

(Argued January 9, 1975 Decided March 20, 1975.)

Docket No. 74-2548

JOHN R. PATTERSON, et al.,

Plaintiffs-Appellees,

—against—

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellees,

—against—

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants-Appellees.

DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, et al.,

Intervenors.

JAMES V. LARKIN,

Intervenor-Appellant.

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Before:

FEINBERG, MANSFIELD and OAKES,

Circuit Judges.

Appeal by an intervenor, a white non-union employee, from an order of the United States District Court for the Southern District of New York, Lawrence W. Pierce, *Judge*, approving, in an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.*, a settlement agreement which provides among other things for an affirmative action program setting goals and establishing procedures for minority access to union jobs, and providing compensatory back pay to minority workers.

Affirmed.

MICHAEL B. TARGOFF, Esq., New York, N.Y. (Willkie Farr & Gallagher, Deborah M. Greenberg, Jack Greenberg, Esq., Edward F. Greene, Esq., New York, N.Y., of counsel), *for Plaintiffs-Appellees.*

O'DONNELL & SCHWARTZ, New York, N.Y. (Michael Klein, Esq., New York, N.Y., of counsel), *for Defendant-Appellee Newspaper and Mail Deliverers' Union of New York and Vicinity.*

MICHAEL S. DEVORKIN, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, Gerald A. Rosenberg, Assistant United States Attorney, William A. Carey, General Counsel, Equal Employment Opportunity Commission, Joseph T. Eddins, Associate General Counsel, Charles L. Reischel,

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Beatrice Rosenberg, Attorneys, New York, N.Y., of counsel), *for Plaintiff-Appellee Equal Employment Opportunity Commission.*

HERMAN TARNOW, Esq., New York, N.Y., *for Intervenor-Appellant Larkin.*

MANSFIELD, *Circuit Judge:*

At issue on this appeal is the appropriateness of relief against discrimination in the employment of news deliverers. In the past we have been called upon to review relief granted in cases where discrimination has been established under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.*, including the use of minority percentage goals and affirmative hiring and promotion programs. See, e.g., *Rios* v. *Enterprise Assn. Steamfitters, Local 638,* 501 F.2d 622 (2d Cir. 1974); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Serv. Comm.,* 482 F.2d 1333 (2d Cir. 1973); *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971). The present appeal presents several variations on the theme. Unlike previous cases the affirmative relief under attack here does not result from an order of the district court entered after a determination of the merits of the action but from a settlement agreement between the plaintiffs, who are minority persons seeking employment as news deliverers, the defendant Newspaper and Mail Deliverers of New York and Vicinity ("the Union" herein), and the Government. The settlement was reached after a four-week trial in the Southern District of New York before Lawrence W. Pierce, *Judge,* who approved the agreement. The person challenging the relief is not an aggrieved minority employee but a white non-union worker, James V. Larkin, who, having been permitted to intervene,

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seeks to set aside the agreement as unlawful on the ground that it affords benefits to minority workers[1] not given to similarly situated white workers, retarding the advancement rate and diluting the work opportunities of these white workers.

Because he had heard a four-week trial in this case and because of the public interest involved in a Title VII action, Judge Pierce considered in a thorough opinion the merits of the plaintiffs' action and the conformity of the settlement to the goals of Title VII and the rights of the parties. See 384 F. Supp. 585 (S.D.N.Y. 1974). We find no abuse of discretion in Judge Pierce's approval of the settlement and therefore affirm.

This appeal arises out of two consolidated actions. One was brought by the Equal Employment Opportunity Commission against the Union, the New York Times ("Times" herein), the New York Daily News ("News" herein), the New York Post ("Post" herein), and about 50 other news distributors and publishers within the Union's jurisdiction. The other is a private class action on behalf of minority persons. Both complaints allege historic discrimination by the Union against minorities, and charge that the present structure of the Union's collective bargaining agreement and the manner of its administration by the Union perpetuate the effects of past discrimination in a manner that violates Title VII. The defendant publishers are alleged to have acquiesced in these practices. Appellant Larkin is one of approximately 100 white non-union "Group III" workers at the News who were given permission to intervene under F.R.C.P. 24(a)(2) because of their potential interest in the relief to be fashioned.

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1 The term "minority" as used herein means persons who are Black, Spanish-surnamed, Oriental and American Indian. "White" or "non-minority" refers to all other persons.

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The Union is the exclusive bargaining agent for the collective bargaining unit which embraces all workers in the delivery departments of newspaper publishers and of publications distributors in the general vicinity of New York City, including, in addition to the city proper, all of Long Island, northeastern New Jersey counties, and north to Fairfield County, Connecticut. Of 4,200 current Union members, 99% are white.

Due to variations in the size and quantity of publications to be distributed, the needs of distributors for delivery personnel vary from day to day and from shift to shift. For that reason the work force in the industry is separated by the Union agreement into (1) those holding permanently assigned jobs ("Regular Situations") and (2) those called "shapers," who show up each day to do whatever extra work may be required on that day. The work performed by persons in both categories is unskilled. Shapers are divided into four classifications, Groups I-IV. The order in which shapers are chosen for extra work on each shift is determined according to Group number and by shop seniority of members within each group.

Group I, the highest priority group, consists solely of persons who once held Regular Situations in the industry. Each employer maintains his own Group I list, which is comprised of persons who have been laid off from Regular Situations at other employers, or who have voluntarily transferred from Regular Situations or from classifications as Group I shapers at another employer. When a Regular Situation becomes available, the highest seniority person on the employer's Group I list is offered the position.

Group II is an aggregate list compiled from the entire industry and consists of all Regular Situation holders and Group I members. Taking priority after Group I is ex-

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hausted, it enables regulars and Group I members to obtain extra daily work at employers other than their own.

Major employers maintain a Group III list, which consists of persons who have never held a Regular Situation in the industry. Members of Group III are given daily work priority after Group II. To maintain Group III status, workers are required to report for a certain number of "shapes" each week. Prior to the settlement agreement under review Group III members were theoretically entitled by shop seniority to any Regular Situation that became available if the Group I list had been exhausted. Group IV shapers are last in priority and are required to appear for a shape far less frequently than Group III shapers.

Although the Union represents all delivery workers, membership is limited to Regular Situation holders and Group I members. Historically the Union has excluded minorities and has limited its membership to the first born son of a member. Aside from the chilling effect which restriction of Union membership to whites might by itself have upon minority persons seeking delivery work, there is evidence that minorities were also discouraged from gaining entrance to Group III lists, even though Group III shapers are not members of the Union. Of 2,855 persons now actively seeking work in the industry (which includes 2,460 Regular Situation holders, 123 Group I shapers, and 273 Group III shapers) only 70, or 2.45%, are minority persons.

While the current Group Structure, which was adopted in 1952, appears on its face to open Union membership to anyone in the labor force, Union membership, because of lax administration of the contract provisions, has largely remained attainable only by the family and friends of a Union member. Due to artificial inflation of the Group I lists, no person has in practice made the theoretically

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possible jump from Group III to a Regular Situation since 1963. The evidence suggests that this expansion of the Group I lists has been accomplished primarily by use of voluntary transfers of Group I or Regular Situation holders from the lists of smaller distributors to the Group I lists of more desirable, larger employers, and ultimately to Regular Situations there. Other devices include fictitious lay-offs, enabling the Union member to transfer to Group I of a different employer, and outright false assertions of Group I status by persons who have obtained Union membership cards, the validity of which have not been challeneged by employers.

On the basis of this evidence, which was largely uncontroverted, Judge Pierce, in approving the settlement, had no difficulty concluding that the Union's practices amounted to a violation of Title VII, since they served to "'lock-in' minorities at the non-union level of entry in the industry, and thereby to perpetuate the impact of past discrimination. . . .," conclusions that appear fully justified by the record and are not challenged here. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Rios* v. *Enterprise Assn. Steamfitters, Local 638, supra; United States* v. *Wood, Wire & Lathers, Intl. Union, Local No. 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States* v. *Bethlehem Steel Corp., supra.*

The settlement agreement reached by the parties provides that the Union shall be permanently enjoined from discriminatory practices in violation of Title VII. It establishes an administrator to insure compliance with the terms of the agreement, and provides for the elimination of past abuses, primarily by abolishing voluntary transfers by Union members. It establishes a minority hiring goal of 25%, specifies a procedure for attaining that goal, and provides for back pay to minority workers. Most of these provisions are not challenged by Larkin.

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The 25% goal is to be reached throughout most of the industry by requiring that all incumbent minority persons on the Group III list of each employer as of the date of entry of the order are to be moved immediately to Group I. All new persons hired in the industry and classified in Group III will be employed according to a ratio of three (3) minority persons to two (2) non-minority persons. As each Regular Situation is filled by a Group I member, one Group III member shall be moved to Group I and offered Union membership. This is to be done on an alternating one-for-one basis between minority and non-minority workers. Each two vacancies in Group I will thus be filled by the minority worker in Group III having highest seniority and the highest seniority non-minority worker. The agreement also modifies these provisions insofar as they apply to the smaller employers and to the Daily News, taking into account special conditions affecting each. At the News, an equal number of non-minority persons from Group III will follow those minority workers who move onto the Group I list on the date of the order; also, for a certain time, one minority *and* one non-minority persons will replace *each* person on the Group I list promoted to a Regular Situation.

Larkin's objection to the settlement is premised on the observation that Group III white workers have not benefited from the Union discrimination which is the object of this lawsuit. On the contrary, as Judge Pierce recognized, they too have suffered from Union policies which barred Group III workers from access to Group I and permanent jobs. Upon this premise, Larkin first broadly asserts that because the Group III whites were also discriminated against, they are entitled to the same relief as the minority workers. More specifically, he objects to those aspects of the affirmative action plan which, he

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asserts, allow minorities to "leap-frog" non-minorities with greater seniority. He also attacks the 25% goal.[2]

Discussion

The scope of our review of a district court's approval of a settlement agreement is limited. "[T]he appellate court should intervene only on a clear showing that the trial judge was guilty of an abuse of discretion," *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). While the public objectives embodied in Title VII warrant a careful review of the provisions of the settlement in light of those policies, see *Rios* v. *Enterprise Assn. Steamfitters, Local 638*, 501 F.2d 622, 628 n.4 (2d Cir. 1974), the clear policy in favor of encouraging settlements must also be taken into account, see *Florida Trailer & Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960), particularly in an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals. Nor should we substitute our ideas of fairness for those of the district judge in the absence of evidence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable to all persons concerned and in the public interest, cf. *United States* v. *Wood, Wire & Metal Lathers Intl. Union, Local No. 46*, 471 F.2d 408, 416 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973), especially in a case like the present one where the settlement was approved after a four-week trial of the merits, and two hearings with respect to the fairness and adequacy of

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2 Intervenor in addition suggests procedural infirmities in the court's approval of a plan to which he objected. It is difficult to think of a way in which appellant was denied procedural rights, however, since Judge Pierce afforded him a hearing and thoroughly considered his objections.

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the proposed agreement. Furthermore, unlike appeals from decrees of the district court entered after trial on the basis of findings and conclusions where we may modify the terms of the decree, see, e.g., *United States* v. *Bethlehem Steel Corp., supra,* we are powerless to rewrite the provisions of the settlement agreement. Our only alternative, if we concluded that Judge Pierce had abused his discretion, would be to set aside his approval of the settlement and remand the case for completion of the trial. *United States* v. *Automobile Manufacturers Assn.*, 307 F. Supp. 617 (C.D. Calif.), *aff'd. per curiam sub nom. City of New York* v. *United States,* 397 U.S. 248 (1970).

Although Larkin objects to the use of a 25% goal and to Judge Pierce's conclusion that the minority make-up of the relevant part of the labor force is 30%, he does not suggest any alternative or more reliable figures as to the labor force; he merely calls the court's figures "contrived." In contrast to his failure to provide any evidentiary support for his objection, the record reveals that, in concluding that the 25% goal was appropriate, Judge Pierce relied on population figures in the Department of Commerce's publications *General Population Characteristics—1970 Census of Population* and *General Social and Economic Characteristics, 1970 Census of Population,* and took into account the relevent geographic area and demographic characteristics of those making up the news delivery work force. Thus his conclusion, which followed closely the guidelines laid down in *Rios* v. *Enterprise Assn. Steamfitters, Local 638,* 501 F.2d 622 (2d Cir. 1974), was adequately based.[3]

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3 Intervenor also suggests that his rights under 42 U.S.C. §2000e-2(j) have been violated. That section provides in pertinent part:

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because

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Larkin's argument that he is entitled to the same benefits as the minority workers must also be rejected. This case arises under a statute which by its terms is limited to protection against employment discrimination based on an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Larkin does not allege discrimination against him based on any of these factors. He argues only that the industry's past practices discriminated against all Group III members, minority and non-minority, and that while the settlement agreement remedies the discrimination against minority persons it fails to afford any relief for the harm caused to non-minority persons. Worse still, he asserts, the relief to minority persons is at the expense of the white Group III workers.

At first glance this argument has much appeal. As the district court recognized, Group III workers were the victims of some practices that were harmful to all Group III members, regardless of race. Minority members, on the other hand, were the targets of racial discrimination on the part of the virtually all-white Union. In this Title VII action we are limited to consideration of the fairness of re-

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of race, the color, religion, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

It is well settled in this Circuit that this section does not preclude the use of racial hiring quotas to remedy the effects of past discrimination. *Rios* v. *Enterprise Assn. Steamfitters, Local 638, supra,* 501 F.2d at 630-31; *Vulcan Society* v. *Civil Serv. Comm.*, 490 F.2d 387 (2d Cir. 1973); *United States* v. *Wood, Wire & Metal Lathers, supra.*

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lief directed only to the latter. The objective of Title VII is to "attack the scourge of racial discrimination" which has "caused manifold economic injuries, including drastically higher rates of unemployment and privation among racial minority groups." *United States* v. *Wood, Wire & Metal Lathers Intl. Union*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972), *aff'd.*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). It creates no rights or benefits in favor of non-minority persons or groups. Any past denial of promotion rights to Larkin is clearly not remediable under Title VII. Indeed, Group III white workers have unsuccessfully sought relief for themselves under other statutes. It is thus apparent that Larkin has no right to any of the affirmative relief afforded to the minority groups, including the back pay provisions.[4] Our review, therefore, must be limited to the question of whether the settlement agreement, in remedying minority discrimination, treats the intervenors fairly. See *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

The affirmative-action provisions of the agreement under review affect Group III workers in the industry, and particularly Daily News workers, in two ways. First, the provisions for immediate transfer of incumbent minorities at major employers to Group I and for the filling of Group I openings by alternately promoting one minority worker and then one non-minority worker from Group III to Group I mean that a white Group III worker will advance to Group I less rapidly than would be possible if straight shop

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4 *United States* v. *Roadway Express, Inc.*, 457 F.2d 854 (6th Cir. 1972), relied on by the intervenor, does not suggest otherwise. There the court was faced with a settlement agreement in which the union had agreed to give some benefits to white as well as minority non-union workers. When white union members objected, the court refused to invalidate the agreement. The case does not *require* that a settlement give equivalent benefits to minority and non-minority workers.

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seniority were the basis of promotion. Indeed, a time will shortly come when minority persons not employed in the industry at all on the date when the agreement went into effect may achieve Group I status before many Group III whites with seniority. Although this feature of the agreement is not as beneficial to Larkin as would be promotion on the basis of straight seniority regardless of race, the agreement nevertheless benefits Larkin. It presents him with an opportunity he never had before: the chance to move up to Group I, and eventually to a Regular Situation. Before, there was in effect no seniority system with respect to promotion into Group I. Thus any plan for advancement of Group III members to Group I could only be beneficial to Larkin. Approval of the plan can hardly be labelled an abuse of discretion because it does not advance Larkin as rapidly as minority persons with less seniority. A reasonable preference in favor of minority persons in order to remedy past discriminatory injustices is permissible. See *Rios* v. *Enterprise Assn. Steamfitters*, 501 F.2d 622 (2d Cir. 1974).

Second, the agreement affects daily work priorities. Its provision that all present incumbent Group III minority workers shall move at once into Group I immediately drops Group III whites in daily priority by whatever number of minority workers of lesser seniority are added to the higher priority Group I. Furthermore, the one-to-one ratio for promotion thereafter of workers from Group III into Group I as openings in Group I become available means that an average non-minority Group III worker will not advance as quickly up the daily priority ladder within Group III as he would under straight raceless seniority. This results from the fact that, whenever two openings in Group I become available, one will be filled by a white worker senior to him and one by a minority worker of lesser seniority. Thus he moves up only one step for every two Group I openings.

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The situation is even less favorable at the Daily News where for an initial period, as *each* Group I opening (rather than two openings) becomes available, the employer will add one minority *and* one non-minority employee to Group I. The effect of this expansion of Group I to take in minority members of lesser seniority is likely to slow down the rate of advancement of non-minority persons within Group III more than under a one-for-one arrangement limited to an equal number of vacancies in Group I. Of course, in all cases once a Group III white employee reaches Group I, he will move up in daily work priority (and priority for a Regular Situation) on the same basis as existed before the agreement.

Appellant characterizes these effects as "leapfrogging" or "bumping" of incumbent white workers, see *United States* v. *Bethlehem Steel Corporation, supra,* 446 F.2d at 659, and argues that we have rejected other affirmative action programs having such an effect. It is true that we have suggested that *court ordered* relief involving minority employment goals be confined to entry level positions. Thus in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Serv. Comm.*, 482 F.2d 1333 (2d Cir. 1973), we upheld the imposition of racial hiring quotas at the patrolman's level, the entry level of the police force, but rejected the use of such quotas for promotion to higher ranks. In *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971), we simply noted that minority transferees under the court's order would be transferred into job vacancies created in the normal course of business and that no incumbent employee would be "bumped" out of his job. *Id.* at 664. In neither case did we specifically pass on the propriety or fairness of "bumping" an incumbent.

These cases do not support rejection of the agreement that has been reached in this case. The *Bridgeport*

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Guardians decision was based upon the failure to establish any discrimination within the promotional system, the proof being limited to discrimination at the point of entry into the police force, i.e., in qualifying for the rank of patrolman. See 482 F.2d at 1338-41. In the present case, on the other hand, there has been racial discrimination throughout the industry. Furthermore, even assuming the desirability of confining use of quotas to entry level positions, the effective point of entry into employment in the industry has been at Group I, not Group III. Judge Pierce found that "Group III workers do not have full-time employment, nor do many of them have great expectations or intentions of working full-time while they shape from the Group III list." It is true, as appellant points out, that both Group I and Group III workers must shape regularly and neither has assurance of regular work. But the fact remains that traditionally a worker who reached Group I was on the road to a Regular Situation, whereas one who was in Group III would not progress above that level.

Even assuming that "bumping" of incumbents from their present jobs is inadvisable in an affirmative hiring scheme, it is inaccurate to characterize Group III workers as having been "bumped." They have retained their positions; they have not been delisted in favor of minorities. Moreover, we are not dealing with workers who have been steadily employed under conditions where seniority is synonymous with an assured job but with a fluctuating group of shapers competing for a limited amount of work that varies widely from day to day. Although some may have declined somewhat in their daily work priority, as Judge Pierce pointed out, the actual effect of this decline is difficult to gauge since the availability of work at a given shape "depends on the stability of the total number of jobs available from shift to shift and whether or not the new person chooses

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to shape the same shift. In other words, assessing a shaper's expectation is a highly speculative exercise." In addition, the number of minority workers promoted to Group I on the date the agreement became effective, which solely accounts for any decline in daily work priority, is quite small. Only 13 of 178 Group III members at the News were minority persons, 6 of 34 at the Times.

The impact of any dilution of daily work opportunities resulting from the settlement agreement is, furthermore, softened by the fact that all current Group III members will be elevated to Group I within a fairly short time. The News estimates that within a month after implementation of the plan all non-minority workers above 47 on the Group III list will be elevated to Group I and that thereafter about 27 non-minority persons per year will be promoted from Group III to Group I. This suggests that any decline in daily work priority attributable to the promotion of presently incumbent minority workers to Group I will be offset for most workers by a rise in priority within Group III resulting from the expeditious upward movement of Group III whites, also made possible by the program. Finally, should some Group III workers have difficulty finding work, the agreement empowers the administrator to assure that any existing work opportunities in the industry be made available to those unable to get at least 45 shifts of work in a calendar quarter.

Aside from the foregoing, there was evidence from which it could be inferred that, if there had been no racial discrimination in the industry, more minority persons would have been able to enter Group III and to gain seniority over many whites within Group III. Thus, although Larkin has been the victim of a system which excluded Group III members, minority and white, from promotion to Group I, he may well have been the modest beneficiary, vis-a-vis the

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minority work force, of a policy that discouraged minority persons from entering Group III. To the extent that the settlement may cause a temporary decline in Group III white worker's rate of promotion and daily work priority, it merely compensates for past discrimination by allowing a reasonable number of minority persons to be promoted to the "rightful place" on the seniority ladder, which they would have occupied but for industry-wide racial discrimination.

In any event it must be recognized that rights of the kind Group III workers here assert "are not indefeasibly vested rights but mere expectations derived from a bargaining agreement and subject to modification." *United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 663. Here appellant has applauded those modifications of the collective bargaining agreement that are favorable to him, such as the removal of the provision limiting Group I to former Regular Situation holders. Under the peculiar circumstances that have governed employment in this industry it does not strike us as unfair to impose certain modifications on the manner in which promotions or qualifications for daily work are determined. Job seniority need not be the only standard for determining promotions. Orders requiring that job vacancies be filled by means other than normal routes of internal promotion have been upheld as necessary to remedy past discrimination, *Gates* v. *Georgia-Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974); *cf. Allen* v. *City of Mobile*, 331 F. Supp. 1134, 1142-43 (S.D. Ala. 1971), *aff'd. per curiam*, 466 F.2d 122 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973) (§1983 action), and, indeed, affirmative relief displacing whites with greater seniority has been granted, see *United States* v. *Sheet Metals Workers International Assn., Local 36*, 416 F.2d 123, 133-34 (8th Cir. 1969).

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The provisions of the settlement agreement affecting Larkin thus cannot be characterized as illegal or unfair. Whatever disadvantages he may temporarily suffer in terms of daily work priority are offset by the substantial improvement in his long range prospects arising from the opportunity that has been created, for the first time, for him to reach Group I and, eventually, Regular Situation status. Judge Pierce therefore did not abuse his discretion in finding the settlement agreement to be fair to Larkin. The order is affirmed.

FEINBERG, *Circuit Judge* (concurring):

I concur in the result.

This case involves the difficult issue whether a hiring quota based upon race can be legally imposed under the Civil Rights Act of 1964 or the United States Constitution. In the past few years, this court has twice held that such quotas may be utilized to correct past discriminatory practices in public employment. *Vulcan Society* v. *Civil Service Comm'n*, 490 F.2d 387 (2d Cir. 1973) (firemen); *Bridgeport Guardians, Inc.* v. *Civil Service Comm'n*, 482 F.2d 1333 (2d Cir. 1973), petition for cert. filed, 43 U.S.L.W. 3282 (U.S. Nov. 11, 1974) (policemen). We have also permitted such remedial quotas in two cases in which the employment was in the private sector of the economy. *Rios* v. *Enterprise Ass'n Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States* v. *Wood, Wire & Metal Lathers, Local 46*, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973).

Nevertheless, I believe a strong note of caution is called for and should be stated. In *Rios*, Judge Hays wrote a powerful dissent, arguing that section 703(j) of the Civil Rights Act, 42 U.S.C. § 2000e-2(j), bars the use of court-

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ordered racial hiring quotas.[1] He distinguished our decisions in *Vulcan Society* and *Bridgeport Guardians* on various grounds, the most persuasive of which was that "there was no other means of affording relief that did not interfere with essential public services" provided by firemen and policemen. 501 F.2d at 638. In both cases, hiring had to continue while new, non-discriminatory employment lists were drawn up. Judge Hays also distinguished *Wood, Wire & Metal Lathers* because the union there, in accepting a settlement, waived the benefit of section 703(j). A close analysis of the cases in our circuit thus suggests that *Rios* is the only decision squarely holding that a court may impose a racial quota in a private employment case in the absence of a settlement.

Emphasizing the status of the authority in this circuit on the issue is worthwhile because, as we have earlier pointed out, quotas should be approached "somewhat gingerly." *Bridgeport Guardians*, supra, 482 F.2d at 1340. The reason for this is clear. A racial quota is inherently obnoxious, no matter what the beneficent purpose. Such a quota is demeaning and divisive. At best it is a lesser evil. It is not to be encouraged.

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1 Section 703(j) provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

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However, this case is not an appropriate one for re-examination of the subject. The past discrimination against minority workers here was made quite clear after a four-week trial to the court. Minorities are conspicuously absent from the ranks of Group I and Regular Situation holders even though there are no special skills required to fill the jobs involved. The intervenor asks us to upset a settlement agreement that provides benefits for whites as well as for minorities. The quota the principal parties have agreed upon is intended to be of short duration. 384 F. Supp. at 590-91. And finally, the intervenor does not direct his main attack against the idea of a hiring quota; he objects to its size and the effect on him and others already in the industry in Group III status.

Under all of these circumstances, I concur in the result.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN R. PATTERSON, et al.,

Plaintiffs,

- v - 73 Civ. 3058

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

- v - 73 Civ. 4278

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, et al.,

Defendants.

JAMES LARKIN, DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, et al.,

Intervenors.

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MEMORANDUM OPINION AND ORDER

This memorandum approves a settlement reached by all of the parties after a four-week trial on the merits of two consolidated actions charging employment discrimination in the newspaper and publications delivery industry in the New York City area. The provisions of the agreement are intended to achieve a 25% minority[1/] employment goal in the industry within five years. At the present time, minority employment in the industry is less than 2%; the comparable percentage of minorities in the relevant labor force in the New York City area is approximately 30%. The agreement also provides for supervision of hiring practices and employment opportunities in the industry to the benefit of both minority and non-minority workers.

One of the actions has been brought by the Equal Employment Opportunity Commission (EEOC) and names as defendants the Newspaper and Mail Deliverers Union of New York and Vicinity (the Union), the New York Times (Times), the New York Daily News (News), the New York Post (Post) and some fifty other publishers and news distributors within the Union's jurisdiction. The other action is a private class action on behalf of minority persons. Both actions charge that the Union, with the acquiescence of the publishers and distributors,

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has historically discriminated against minorities; and that the present structure of the collective bargaining agreement, combined with nepotism and cronyism and other abuses i employment and referral practices, have perpetuated the effects of the past discrimination, in violation of 42 U.S.C. §§2000e et seq. (Title VII).. Each lawsuit sought an affirmative action program designed to achieve for minorities the status they would have had in this industry but for the alleged discriminatory practices.

Both actions were filed in 1973. After months of negotiation, the parties reached a settlement agreement in early 1974, but it was rejected by vote of the Union's membership. Following another abortive attempt to obtain ratification from the membership, the two actions were consolidated with each other for a hearing on motions for preliminary relief before this Court. The hearing commenced May 14, 1974. At its conclusion on June 12, 1974, the Court ordered the hearing consolidated with trial on the merits, pursuant to Fed.R.Civ.P. 65(a)(2), giving the parties the opportunity to present further evidentiary submissions or testimony. No further evidence was presented. Instead, the parties having once again entered into settlement discussions, brought before this Court for approval a Settlement Agreement dated June 27,

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1974, entered into by all the plaintiffs and all the defendants, and ratified by the Union membership.

A hearing on the fairness, adequacy and reasonableness of the Settlement with respect to the plaintiffs' class was held on August 27, 1974, after due notice to that class. On the same date the Court also held a separate hearing on the legality of the relief provided in the Settlement and its impact on a group of non-minority workers who had, prior to trial, been permitted to intervene in the consolidated actions for the purpose of challenging any affirmative relief which might have affected their interests.

The Standards

As a general proposition, when a settlement agreement is presented to the Court for approval, the Court's role is limited to the exercise of its equitable powers. The Court is not to substitute its judgment for that of the parties. See, e.g., Glicken v. Bradford, 35 F.R.D. 144, 151 (S.D.N.Y. 1964); United States v. Carter Products, Inc., 211 F.Supp. 144, 148 (S.D.N.Y. 1962). Instead, its role is to assure that the settlement is fair to the class and the parties and represents a reasonable resolution of the dispute. See, e.g., State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp 710 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert.

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denied, 404 U.S. 871 (1971.. Ordinarily, the Court is not expected to examine conclusively into the underlying facts or legal merits of the action. See, e.g., Newman v. Stein, 464 F.2d 689, 691-93 (2d Cir.), cert. denied, 409 U.S. 1039 (1972); United States v. Carter Products, Inc., supra, 211 F. Supp. at 148.

But, this is not an ordinary case. It must be recognized that efforts to correct discrimination affect the strongest public sensitivities. The interests involved are far broader than those of the particular parties in a particular lawsuit. Therefore, the parties cannot be permitted to settle for less than, or for more than, the facts of the case and public policy expressed in Title VII mandates. Thus, although the Court is of the opinion that even at this late stage public policy is served by an agreement rather than an adjudication, a more searching discussion of the merits is warranted. In fact, the state of the law in this Circuit may require certain findings of fact to support affirmative action in a Title VII case even when it is resolved by settlement. See, Rios v. Enterprise Association Steamfitters Local 638, #73-2110, Slip Op. at 4379 n.4 (2d Cir., June 24, 1974), explaining United States v. Wood, Wire and Metal Lathers International Union, 471 F.2d 408 (2d Cir. 1973), cert. denied,

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412 U.S. 939 (1973). Further, a more conclusive examination of the merits is necessary in this case because the affirmative action program and the minority goal in principle, and the 25% minority goal, are all vigorously disputed by the intervenors.

Inasmuch as this Court has heard a four-week completed trial in these actions, it is in a unique position to find facts and to set forth conclusions of law. Therefore, what follows shall constitute this Court's findings and conclusions to the extent that they form the necessary legal support for the affirmative action proposed.

The Background

Most of the facts are not contested. The Union is the exclusive bargaining agent for a collective bargaining unit encompassing the work performed in the delivery departments of newspaper and publication distributors in the New York area. Its geographic jurisdiction has been variously stated, but it is fair to define it by where the employers in the industry are located: in the metropolitan area of New York City (within a fifty mile radius of Columbus Circle), the New York counties of Nassau and Suffolk, the New Jersey counties of Bergen, Essex, Hudson, Middlesex, Monmouth, Passaic and Union, and the Connecticut county of Fairfield.

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The nature of the delivery industry is such that the employers' needs for delivery department employees vary from day to day, and indeed, shift to shift, depending upon the size and quantity of the publication(s) being distributed. Thus, each employer by the terms of the Union contract, maintains a regular work force (Regular Situation holders) for its minimum needs, and depends upon daily shapers to supplement the force. By the terms of the contract, at the major employers the shapers are categorized into groups with descending daily hiring priorities. The Group I list of shapers is restricted, by contract, to persons who have at one time held a Regular Situation in the industry. They have first shaping priority at every shift, in order of their shop seniority. After the Group I is exhausted at any given shift, the contract provides that the next hiring priority shall go to Group II members. Group II consists of all persons in Group I and all persons holding Regular Situations in the industry. Once all of the Group II members who have appeared for the shape are put to work, the contract provides that the remaining open jobs, if any, will go to Group III members who have appeared for the shape, in order of their shop tenure.

The shaping system is considerably less structured for the smaller publications and distributors, and, in fact

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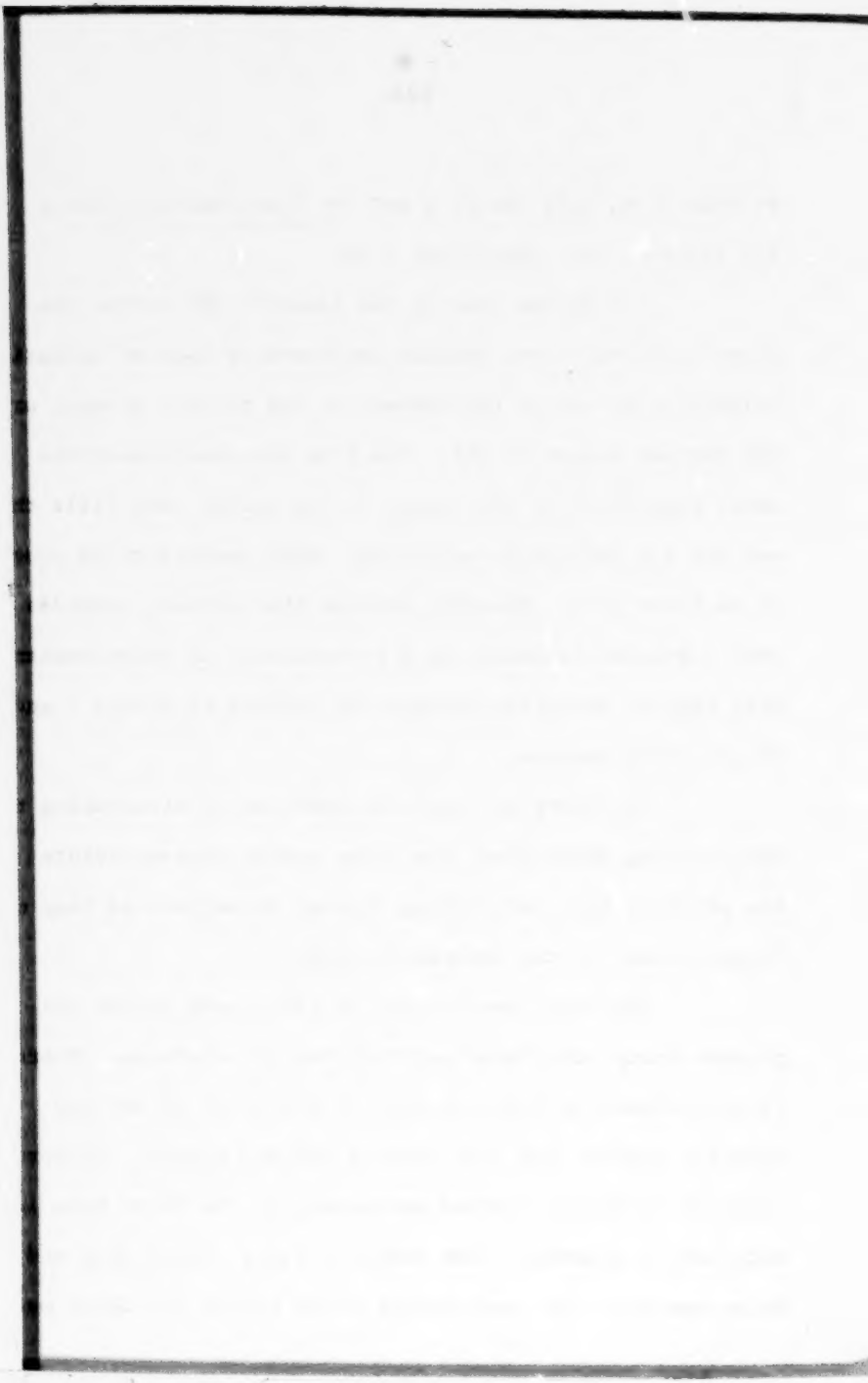
at this time, only the News and the Times maintain Group III lists of any significant size.

All of the jobs in the industry are within the Union's jurisdiction, whether performed by Regular Situation holders or by any of the members of the various groups, or any one who shapes at all. The jobs are essentially the same, regardless of the status of the worker who fills them, and are all relatively unskilled. Most workers drive trucks or do floor work. However, because the contract provides that a Regular Situation is a prerequisite to Union membership, only Regular Situation holders and members of Groups I and II are Union members.

In theory at least, in addition to structuring the daily hiring priorities, the Group system also represents the priority list for filling Regular Situations as they may become vacant in the newspapers shops.

The Union was founded in 1901, long before the present Group structured contract was in existence. There is no evidence to indicate that at that time it had any minority members (as that term is defined today). Historically it virtually limited membership to the first born legitimate son of a member. The industry had a closed shop and Union members were consistently hired before non-Union men



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at all industry shapes. In 1952, the industry adopted the contract which included the rudiments of the Group structure described above.

It is abundantly clear that the nepotistic policy of the Union prior to 1952 resulted in discrimination against minorities. See, e.g., Rios v. Enterprise Association Steamfitters Local 638, supra, at 4377-78; United States v. Wood, Wire and Metal Lathers International Union, 328 F.Supp.429, 432 (S.D.N.Y. 1971). The fact that the Union's intent was not to discriminate against minorities, but to prefer Union members and their sons, does not change the basic conclusion. The effect of such policies, deliberate or not, was to foreclose minorities from employment in the industry. It is the discriminatory effect of practices and policies, not the underlying intent, which is relevant in a Title VII action.

The Group structure, instituted in 1952, appears on its face to discard these discriminatory policies and to open up regular employment opportunities and Union membership to the entire labor force. But, there is uncontroverted evidence that certain relevant provisions of the contract have been administered haphazardly, and that the Group structure has been circumvented by friends and family of Union members. In practice, the fact is that no non-Union Group III shaper in

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the industry has achieved a Regular Situation, and thus Union membership, by moving up the Group system since 1963.

Testifying at trial, the Union president credibly asserted that the Union was not motivated by any intent to discriminate against minorities, but went on to say that, "I would be the first to admit that we favor and we are partial to our members and I'm not ashamed of that." This attitude is, of course, admirable under most circumstances. There would be nothing unlawful about its effect under Title VII providing that minorities, historically, had been provided free and equal access to Union membership. But the facts indicate that such is not the case here. And even without evidence of abuse of the Group system, the statistics alone reveal the present situation.

There are presently some 4,200 members of the Union, including some 900 pensioners. More than 99% of these Union members are White (non-minority).

There are, at present, a total of 2,855 persons actively working in the industry--this includes Regular Situation holders (2,460), Group I members (123), and Group III members (272).[2/] Of the total in these categories, 70 persons--2%--are Black, Spanish-surnamed, Oriental or American Indian. Of the 70 minority persons, 28 are scattered

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among the smaller publishers and distributors; 24 work at the News where the force is approximately 900; 17 work at the Times where the force is approximately 400; and 1 works at the Post where the force is approximately 318.

These figures demonstrate that 20 years after the industry instituted a neutral Group structure of employment and hiring priorities, the participation of minorities in this industry is still grossly disportionate to the percentage of minority workers in the relevant labor force, which the EEOC suggests is approximately 30%.[3/] Even allowing for the fact that the industry has seen many newspapers disappear in these last two decades, with a concomitant loss of jobs, the clear inference from these statistics is that abuses of the Group structure and indeed the Group structure itself, is serving--however unintentionally--to "lock-in" minorities at the non-Union entry level of the industry, and to thereby perpetuate the impact of past discrimination on the minorities with whom these Title VII actions are concerned. It is this present impact of past practices which justifies the affirmative, corrective relief embodied in the Settlement Agreement. See, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rios v. Enterprise Association Steamfitters Local 638, supra; United States v. Wood, Wire and Lathers International Union, supra; United

States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

The Terms of the Agreement

As with many resolutions of employment discrimination cases, the Settlement Agreement in these actions contains general provisions permanently enjoining the defendants from discriminatory practices in violation of Title VII. And, like the judgment in Rios (71 Civ. 847, S.D.N.Y., June 24, 1973) and the agreement in Wood, Wire (68 Civ. 2116, S.D.N.Y., Feb. 25, 1970), this Settlement Agreement sets forth a minority employment goal. In this case, it is for 25% minority employment in the industry within five years.[4/] But, unlike Rios and Wood, Wire, this Settlement Agreement does not merely commit the parties to the future development of a plan to achieve that goal. Instead, it sets forth a plan with great specificity, including variations on the general theme to account for varying circumstances between different employers. Such detail indicates that the plan is the result of hard, serious and good faith negotiations, and that the different pressures, perspectives and interests of the parties have been confronted and already resolved. This serves to increase the Court's confidence that the plan is workable, and can be implemented immediately.

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The plan is built upon the outline of the present Group priority structure of the collective bargaining agreement. It provides for an administrator whose duties include not only close supervision of the plan, but also of employment opportunities in the industry on behalf of all workers. Its major features include elimination of past abuses of the Group system; elimination of the contract provision which restricted Group I to former Regular Situation holders; provision for an orderly flow of Group III shapers--alternating one minority person with one non-minority person--into steady and secure employment in the industry, first as members of Group I and from there, as Regular Situations become vacant, to Regular Situations. Union membership will be offered to each Group III worker as he reaches the bottom of Group I. The plan further provides that until the 25% minority employment goal is achieved, employers shall hire, at the entry level, three minority persons for every two non-minority persons. In addition, minorities who are presently active on Group III at the News and the Times will immediately move to the bottom of the Group I list, with an equal number of non-minorities to immediately follow them onto the Group I list. These minorities will be given pension benefits they would have earned but for the disadvantages they have encountered. With

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the same purpose, funds have been established by the defendants to provide back pay awards chiefly to these persons.

The Intervenors' Objections

The Group III list at the News numbers 178. Scattered throughout the list, in terms of tenure, are 13 minority persons. The intervenors purport to speak for the other 165 persons on the list, and more broadly for all non-minority, non-Union workers in the industry.

Most of the provisions of the Settlement Agreement are applauded by the intervenors, as well they might be. By regulating employment opportunities in the industry, unlocking Group III and Group I, Regular Situations and Union membership, the Agreement will operate beneficially for the intervenors as well as for the minorities.

The focus of their objection is on the order of the flow from Group III to Group I. They assert that the flow ought to be in strict order of tenure on Group III. To immediately move all of the present Group III minorities to the Group I list ahead of some non-minorities who have been listed for a longer period of time on Group III, they assert, is to engage in "leap-frogging" not intended by Title VII. Further, they argue, that the system becomes even more onerous when the provisions for alternating minority/non-minority

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elevation to Group I go into effect, because after the few minorities who have any tenure in the shop are moved to Group I, the employer will be required to move minorities with no tenure at all ahead of some present Group III non-minorities.

The facts selected by the intervenors in support of their objections are so. And, at first glance their frustration and anger with this Settlement Agreement is understandable, and their solution is appealing. These intervenors from Group III, as individuals, have also suffered the effects of the Union's nepotism; they have also attacked the present practices and abuses in other forums, under different statutes. Certainly this Court does not accept the argument that these particular men have benefited from a discriminatory system.

But, on deeper examination of the Settlement Agreement and the intervenors' objections, there are a number of reasons why this Court does not, and indeed can not, view the intervenors as raising countervailing considerations of such a substantial nature as to preclude approval of the plan.

First and dispositive of all the issues raised by the intervenors, the Settlement Agreement simply does not trample on their employment opportunities. In the long run, it must be acknowledged by all concerned that the effect of this Agreement, if it operates as predicted, will be to

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achieve Regular Situation or Group I status for all members of Group III, minority and non-minority alike, within a relatively short time-span. Without this Settlement, Group III workers had little if any hope of ever achieving either status under the present system. The intervenors do not contend otherwise. Instead, their objections deal in the main with interim measures which do, in fact, move some minorities faster than some non-minorities. But it must be noted that once a Group III non-minority is elevated to Group I, his daily shaping opportunities will be no less than they presently are and indeed they may be greater. The News projections submitted to this Court indicate that within a month after implementation of the plan, the non-minority who is number 47 on the Group III list, and all non-minorities above him, will have been elevated to Group I. The progression thereafter is expected to be approximately 27 non-minority persons to Group I each year. Also the Settlement Agreement provides other benefits to Group III non-minorities, not the least of which is the appointment of an administrator who is empowered to assure that existing work opportunities in the industry shall be made available to any Group III person unable to get at least 45 shifts of work in any calendar quarter.

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Further, even if the Settlement Agreement did not provide non-minorities with these benefits, the intervenors' position is not factually or legally sound. Their premise is that the Settlement Agreement will oust them from what they perceive as vested seniority rights in their Group III order. If, in fact, this Settlement Agreement affected firm and realistic seniority rights and expectations of innocent non-minority workers, there could be doubts as to the validity of the relief afforded. See, e.g., United States v. Bethlehem Steel Corp., supra, 446 F.2d at 661. But, in this case, regardless of the priority structure of the present contract, and the language which may be used in it, the fact remains that Group III workers do not have full-time employment, nor do many of them have any great expectations or intention of working full-time while they shape from the Group III list. They are shapers. And, to the extent that the present contract structure, in theory, gives them certain priorities, by tenure on Group III, to achieve Regular Situations, the facts have demonstrated that they could not have any realistic expectation of such movement actually occurring. As noted above, no Group III worker has moved up the list to a Regular Situation since 1963.

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Their expectations with respect to daily shape priorities must be viewed in a somewhat different light. When an additional person is placed in front of a shaper, theoretically his chances of working any particular shift are decreased by a factor of one job. This, of course, depends on the stability of the total number of jobs available from shift to shift and whether or not the new person chooses to shape the same shift. In other words, assessing a shaper's expectation is a highly speculative exercise. The Court does not mean to minimize a Group III member's vested emotional interest in his position at a shape, but it cannot be equated with the worker who might be "bumped" from a steady and seemingly secure position by an outside minority with less seniority than him. Further, it must be pointed out that even if these shaping priorities were viewed as providing firm expectations, "[such] seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification." United States v. Bethlehem Steel Corp., supra, 446 F.2d at 663. Indeed, the intervenors themselves recognize this principle when they approve of many changes made in the collective bargaining agreement by the proposed Settlement.

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Also, it must be said that the relief the intervenors suggest, which would observe strict tenure of the Group III list, would most likely not provide the relief mandated by Title VII for minorities. Given the fact that the active work force at the News numbers 900 and includes only 24 minority persons, it would clearly take a far longer period of time to reach a goal of 25% minority employment. Because the minority percentage is so low, the same objection holds true if, as the intervenors have suggested, the Group I and Group III lists were dovetailed by shop tenure.

Finally, it must not be forgotten that this is a Title VII case. Such cases, as Judge Frankel has said in Wood, Wire are "launched by statutory commands, rooted in deep constitutional purposes, to attack the scourge of racial discrimination in employment. . . . [a]nd we know that, in addition to the spiritual wounds it inflicts, such discrimination has caused manifold economic injuries, including drastically higher rates of unemployment and privation among racial minority groups." United States v. Wood, Wire and Metal Lathers International Union, Local Union 46, 341 F.Supp. 694, 699 (S.D.N.Y. 1972). Title VII is an expression of a commitment to correct minority employment discrimination and, hopefully, the vast social consequences that flow from

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it . id afflict the whole o" the nation. The statute does not undertake to correct all forms of employment discrimination. Thus, to the extent that what the intervenors seek here is relief equal to that afforded minorities, it has no legal foundation, in this case. Under the law, relief here must be limited to victims of the kind of discrimination prohibited by Title VII. United States v. Bethlehem Steel Corp., supra, 446 F.2d at 665. There is no evidence and no assertion that the intervenors have been discriminated against on account of race, religion, color, sex, national origin, or because they have made charges, testified, assisted or participated in any enforcement proceedings under Title VII.

The 25% Minority Employment Goal

There remains the requirement of Rios v. Enterprise Association Steamfitters Local 638, supra, at 4387, for reliable factual support for the 25% goal. All of the parties have agreed to the figure. The EEOC has based its conclusion on relevant labor force statistics contained in the tables published by the United States Department of Commerce in a publication entitled General Social and Economic Characteristics, 1970 Census of Population, for the relevant geographic areas of the Union's jurisdiction. Using what this Court agrees is the most reliable profile possible of

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the candidate for deliverers' work, the EEOC has extracted figures for Black males over 16 years of age with a high school diploma or less. With considerable ingenuity, the agency has also extrapolated comparable figures for minorities other than Black. Added together they indicate that the relevant labor force is 30% minority. Although the private plaintiffs and the intervenors have submitted other calculations and bases with respect to minority representation in the relevant labor force, in this Court's view the EEOC analysis is the soundest and provides ample support for the 25% minority goal included in the Settlement Agreement.

Conclusion

This Court has found that the affirmative relief provided in the Settlement Agreement is justified by the facts of this case. It has found that the 25% minority goal is supported by reliable statistics. It has found that the affirmative relief provides members of the plaintiffs' class and other minorities with an adequate, fair and reasonable route to their "rightful place" in this industry, and that the Settlement Agreement is enforceable, legal and in the public interest. The Court has also found that the Settlement Agreement does not so interfere with the rights of the intervenors as to require disapproval.

Therefore, the motion of the parties for approval of the Settlement Agreement is hereby granted. Settle Order, upon the consent of the parties, endorsed thereon by their attorneys, accordingly.

SO ORDERED.

Dated: New York, New York
September 19, 1974

/S/ LAWRENCE W. PIERCE

LAWRENCE W. PIERCE
U. S. D. J.

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FOOTNOTES

1. "Minority" as it is used in this Settlement Agreement refers to the definition of that word by the Equal Employment Opportunities Commission, and means people who are Black, Spanish-surnamed, Oriental and American Indian.

2. Group II is not counted here because Group II is constituted of persons who also hold Regular Situations or Group I positions in the industry. They are permitted by the contract to shape in any shop other than their own, in addition to their regular jobs.

3. See pp. 23-24.

4. The parties have defined "employment" as encompassing Regular Situations and Group I positions. Their view is that a place in either of these two groups represents a steady, secure job in the industry. The Court agrees, at this time. The definition is subject to revision by terms of the Settlement Agreement.

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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy-five.

Present:

HON. WILFRED FEINBERG,

HON. JAMES L. OAKES,

HON. WALTER R. MANSFIELD,

Circuit Judges.

----------x

JOHN R. PATTERSON, et al.,

Plaintiff,

v.

NEWSPAPER & MAIL DELIVERS UNION OF NEW YORK & VICINITY, et al.,

Defendants.

----------x

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----------x

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

NEWSPAPER & MAIL DELIVERERS' UNION, etc.

Defendants,

JAMES V. LARKIN,

Intervenor-Appellant.

----------x

A petition for a rehearing having been filed herein by counsel for the intervenor-appellant, JAMES V. LARKIN,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy-five.

----------x

JOHN R. PATTERSON, et al.,

Plaintiffs,

v.

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK, et al.,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

Docket No. 74-2548

NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK, et al.,

Defendant.

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DOMINICK VENTRE, FRANK SCHILLEMI, GERALD KATZ,

Intervenors,

JAMES V. LARKIN,

Intervenor-Appellant.

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the intervenor-appellant, JAMES V. LARKIN, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN, Chief Judge

NOV 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1975

No. 75-155

JAMES V. LARKIN,

Petitioner,

v.

JOHN R. PATTERSON, et al.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

October Term 1975

No. 75-155

JAMES V. LARKIN,

Petitioner,

v.

JOHN R. PATTERSON, et al.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition, except that, of the petitioners named in the caption, only James V. Larkin was a party to the proceedings in the Court of Appeals and is properly before this Court (1a, 45a).[1]

Questions Presented

1. Whether, in an employment discrimination action brought on behalf of racial and ethnic minorities, the plaintiffs and defendants can enter into a consent decree which

[1] This form of citation is to pages of the appendix to the Petition for Certiorari.

grants relief to all disadvantaged workers, but grants minority workers some relief not granted to white workers?

2. In an employment discrimination action, whether the parties can enter into a consent decree which specifies a temporary one-minority-for-one-white ratio for filling vacancies in that hiring priority group which provides regular employment and from which minorities have been discriminatorily excluded?

Statement

This action is a consolidation of a suit brought by private plaintiffs under Title VII of the Civil Rights Act of 1964[2] and 42 U.S.C. §1981 and a pattern and practice suit brought by the United States[3] under Title VII to redress employment discrimination against minorities in the delivery departments of the New York City area newspaper and magazine publishers and distributors. Private plaintiffs were three black men who had "shaped" at the New York Times ("the Times") and the New York Daily News ("the News") but were denied access to the hiring priority group which assured regular employment in the industry. Defendants were some fifty publishers and publication distributors ("the employers") and the union having jurisdiction over the employees in their delivery departments, the Newspaper and Mail Deliverers' Union of New York City and Vicinity ("the union"). Approximately 100 non-union non-minority persons working as extras in the delivery department of the News, of whom petitioner is one, were permitted to intervene for the limited purpose of presenting

[2] 42 U.S.C. §§ 2000e *et seq.*

[3] The Equal Employment Opportunity Commission was substituted for the United States as plaintiff in accordance with 42 U.S.C. §§ 2000e-6(c) and (d).

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evidence and argument "with respect to the narrow question of relief to be granted should the plaintiffs prevail."

The gravamen of this action is that the collective bargaining agreements entered into between the union and the employers have, by their terms and in their uneven application, operated to discriminate against minorities by providing for continual preferential hiring of the 99% white union membership and to perpetuate past minority exclusion from the union and from regular employment in the industry.

The Hiring System

Because of variations in the size and quantity of publications to be distributed on a given day, employers' needs for delivery personnel vary from day to day. Employers, therefore, depend on a regular work force with permanently assigned jobs (Regular Situation Holders) and daily extra shapers. The daily shapers are divided into four groups with descending priority for both daily hiring and movement into Regular Situations.

Each employer has its own Group I list which has shaping priority at each shift, in order of shop seniority, and is, by the terms of the collective bargaining agreement, limited to persons who once held a Regular Situation in the industry. These Group I shapers have either been laid off as a Regular Situation Holder by their current employer or another employer, or have voluntarily transferred to their current employer's Group I list from positions as Regular Situation Holders or Group I shapers elsewhere in the industry. The Group II list is an aggregate industry-wide list consisting of all present Regular Situation Holders and Group I shapers in order of their date of membership in the Union, and it has hiring priority at a given

shift of an employer after that employer's Group I list is exhausted. Individuals may use their Group II status to obtain daily extra work at any employer in the industry except their own. Each employer has its own Group III list which has shaping priority in order of shop seniority after all Group I and Group II men present at a shift are put to work. Group IV shapers work after Group III and are required to shape only occasionally.

Regular Situation Holders and Group I and Group II shapers are union members, having been admitted, generally, when they first obtained Regular Situations. Group III and Group IV shapers are not eligible for union membership. Regular Situation Holders and Group I shapers are, as a practical matter, assured of steady employment. Other shapers are not.

While, theoretically, vacant Regular Situations are filled first from an employer's Group I list and, when that is exhausted, from the Group III list, in fact, because of industry layoffs and a variety of abuses of the hiring system, which resulted in a steady flow of union members and their relatives and friends onto the Group I lists, no Group III shaper had, prior to this action, moved into a Regular Situation and thus into union membership at the News or the Times, the most desirable shops in the industry, since 1963.

The union was founded in 1901 and historically limited its membership to the first born legitimate son of a member. See *N.L.R.B.* v. *Gaynor News Co.*, 347 U.S. 17, 35 (1953). Until the above-described hiring system was adopted in 1952, the industry had a closed shop in which union members were hired before non-union men. At the time of trial, the union had approximately 4200 members, of whom about 40 were minorities.

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Proceedings Below

After a four-week hearing on plaintiffs' motions for a preliminary injunction, which was consolidated with a trial on the merits, the EEOC, private plaintiffs, the employers and the union entered into a settlement agreement. This agreement was designed to eliminate abuses of the hiring system and to provide opportunities, for the first time, for whites and minorities alike to move up to the Group I lists and into Regular Situations, and to obtain union membership. The only part of the settlement agreement that petitioner objects to is that section which provides that one minority shall be added to the Group I list from the Group III list for each non-minority so added. Since at the time of trial, of 178 Group III members at the News only 13 were minorities, implementation of this provision requires that non-minorities already on the Group III list be matched by minorities new to the industry.

After two hearings with respect to the fairness and adequacy of the settlement agreement, it was approved by the District Court, which found, *inter alia,* that the agreement, far from injuring non-minorities, substantially benefitted them (35a-36a), that Group I was the entry point into regular employment in the industry, and that before the agreement there was in effect no seniority system governing promotion from Group III to Group I (37a). The Court of Appeals affirmed (13a, 15a).

ARGUMENT

This case does not warrant review on certiorari because the decision of the Court of Appeals is in accord with this Court's prior decisions and there is no conflict among the circuits on the questions presented.

This Court has recognized conciliation and settlement as "the preferred means" for achieving the elimination of unlawful employment discrimination. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). In the instant case, the EEOC, a class of private plaintiffs, the union and some 50 employers have, after a four-week trial and strenuous negotiations, entered into a settlement agreement which has been in effect for a year and has already benefitted several hundred employees, minority and non-minority alike, in terms of providing regular employment and realistic expectations of advancement. Petitioner is the only one of about 100 non-minority intervenors who appealed. He is a matriculated chemistry major at City University of New York who shapes off the Group III list of the Daily News but has no serious interest in full-time work in the industry.[4] Petitioner did not ask this Court for a stay of the District Court's order approving the agreement. It would be inequitable to permit petitioner to challenge the agreement now, when petitioner could have done so in a way that would have minimized the disruption which would result from vacating the agreement after it has been in effect for a year.

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[4] The record shows that petitioner did not by any means take full advantage of the employment opportunities that were available at the News. In calendar 1973 petitioner worked 136 shifts while a man two places above him on the Group III list worked over 200 shifts.

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1. *Petitioner Is Not Entitled To Relief Under Title VII.*

Petitioner has never claimed that he was denied union membership or employment opportunities on account of his "race, color, religion, sex, or national origin" 42 U.S.C. §§2000e-2(a)(1) and (c)(1). He claims, rather, that he was discriminated against because he was not the son of a union member. Not only does Title VII fail, by its terms, to afford relief for this type of discrimination, but the legislative history indicates that this omission was intentional. During debate on Title VII the House rejected an amendment offered by Representative Cahill which would have made it an unlawful employment practice to exclude qualified persons from union membership for any reason. A stated purpose of the amendment was to eliminate nepotism in union admissions. Opponents of the amendment made it clear that such broad reform was beyond the scope of Title VII. 110 Cong. Rec. 2593-95 (1964).

Courts of Appeals which have considered the question are in agreement with the courts below that relief under Title VII is available only to those who have been victims of the type of discrimination, e.g., racial, proscribed by the statute. *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 665 (2nd Cir. 1971); *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 588-89, 593 (4th Cir. 1972). Cf. *Gamble* v. *Birmingham Southern Railroad Co.*, 514 F.2d 678, 686 (5th Cir. 1975).

United States v. *Roadway Express, Inc.*, 457 F.2d 854 (6th Cir. 1972), relied upon by petitioner, is not to the contrary. It does not stand for the proposition that non-minorities are entitled to relief under Title VII. There the Court of Appeals simply refused to vacate a consent decree which provided relief for white as well as black employees; it did not hold that Title VII *required* the granting of such relief.

2. *The Affirmative Relief Afforded By The Consent Decree Does Not Involve Any Bumping of Incumbent Employees.*

Petitioner's claim that the one-to-one ratio for additions to the Group I list entails the bumping of incumbent Group III employees by newly hired minority employees is contrary to the findings of the courts below. Group III shapers are not steadily employed, and many of them, like petitioner, do not intend to work full time (37a). They compete with a fluctuating group of shapers having higher priority for work which varies widely in amount from day to day (15a). "[T]he effective point of entry into employment in the industry has been at Group I, not Group III" (*id.*). Moreover, while it was theoretically possible, prior to this litigation, for a Group III shaper to move up into a Regular Situation, there could be no realistic expectation of such promotion (*id.*).[5]

Affirmative relief in the form of hiring ratios and goals to remedy long standing patterns of discrimination in employment have been approved by nine circuits.[6]

Even assuming, for purposes of argument, that Group III shapers did have seniority rights that were interfered

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[5] No Group III shaper had moved into a Regular Situation since 1963 (37a).

[6] *E.g.*, *Boston Chapter, NAACP* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied* 95 S.Ct. 1561 (1975); *United States* v. *Local 46, Lathers*, 471 F.2d 408 (2nd Cir. 1973), *cert. denied* 412 U.S. 939 (1973); *Erie Human Relations Commission* v. *Tullio*, 493 F.2d 371 (3rd Cir. 1974); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States* v. *Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973); *United States* v. *Local 169, Carpenters*, 457 F.2d 210 (7th Cir. 1972), *cert. denied*, 409 U.S. 851 (1972); *Carter* v. *Gallagher*, 452 F.2d 315, 327 (8th Cir. 1972) (*en banc*), cert. denied, 406 U.S. 950 (1972); *United States* v. *Local 86, Ironworkers*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971), aff'g 315 F.Supp. 1202 (W.D. Wash. 1970); *Northeast Construction Co.* v. *Romney*, 485 F.2d 752 (D.C. Cir. 1973).

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with by the decree, at least four circuits have approved decrees or affirmative action plans permitting "new" minorities to enter hiring or referral groups ahead of non-minorities already in the bargaining unit.[7]

3. *The Employers and the Union Had the Right To Modify the Hiring System.*

The affirmative action program contained in the settlement agreement can be justified on the independent ground that it is no more than an agreement between the union and the employer modifying the hiring system previously agreed to in the collective bargaining agreements. Even if the provision requiring the addition of minorities to the Group I lists on a one-to-one ratio with whites did operate to deprive Group III shapers of any rights they would otherwise have had by virtue of their seniority, the agreement must be upheld under the rationale of *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1952), where this Court upheld a collective bargaining agreement which credited employees with the time spent in military service *prior* to their employment in computing their seniority. The priority afforded to minorities in furtherance of the public policy of eliminating discrimination in employment[8] can be no less in the public interest than crediting employees with time spent in military service.

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[7] *Contractors Association* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971), *cert. denied,* 404 U.S. 854 (1971); *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680, 684-86 (7th Cir. 1972); *United States* v. *Sheet Metal Workers Local 36,* 416 F.2d 123 (8th Cir. 1969); *United States* v. *Local 86, Ironworkers, supra.*

[8] *Alexander* v. *Gardner-Denver Corp.,* 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429-30 (1971).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-155

JAMES V. LARKIN, DOMINIC VENTRE, FRANK CHILLEMI, GERALD KATZ, ET AL., PETITIONERS,

v.

JOHN R. PATTERSON, NEWSPAPER AND MAIL DELIVERERS UNION OF NEW YORK AND VICINITY, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NEW YORK DAILY NEWS, NEW YORK TIMES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. App. 1a-20a) are reported at 514 F.2d 767. The opinion and order of the District Court for the Southern

District of New York (Pet. App. 22a-43a) are reported at 384 F.Supp. 585.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1975. A petition for a rehearing was denied on April 29, 1975. The petition for a writ of certiorari was filed on July 28, 1975. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the settlement agreement approved by the District Court treats intervenors, who are white, in a manner which is fair and consistent with Title VII's objectives.

STATEMENT

This is a consolidated action of two Title VII suits filed in the Southern District of New York in 1973, one by minority employees of various publishers and one by the United States under Section 707 of the Civil Rights Act of 1964.[1] Plaintiffs below alleged discrimination against minorities in the newspaper and publications delivery industry in the New York metropolitan area. Specifically, the actions charged that the union, with the acquiesence of the publishers and distributors, had historically discrimi-

[1] The Equal Employment Opportunity Commission was substituted as plaintiff pursuant to Section 707(c) and (d) of Title VII.

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nated against minorities in its admission policies, and that the structure of the collective bargaining agreement perpetuated the effects of this past discrimination.

Petitioners are white, non-union workers who were allowed to intervene to challenge relief affecting their interests. After a four-week trial, plaintiffs and defendants executed a settlement agreement which was approved by the district court over petitioners' objections after the court held separate hearings on the reasonableness of relief with respect to the plaintiffs' class and on the legality of the impact on intervenors.[2]

A. Background

The pertinent facts are stated in the district court (Pet. App. 21a-43a) and the appellate court (Pet. App. 1a-20a) opinions.

Because of the variation in the size and quantity of publications to be distributed on a given day, needs for personnel within the publication delivery industry vary from day to day and shift to shift. Employers in the industry therefore rely not only on a regular work force with permanently assigned jobs, known as regular situation holders, but on daily extra shapers to cover extra work as it is required. All jobs within the industry, whether regular situation or daily shaper, are relatively unskilled and essentially the same. Duties consist either of

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[2] The settlement agreement was approved September 19, 1974, and the decree became effective November 11, 1974.

driving trucks or floor work. The primary advantages of the regular situation holder are the frequency and regularity with which work is available to him. A regular situation is a prerequisite for union membership. Historically, the union, which was 99% white, limited membership to the first born sons of members.

The daily shapers are divided into a four-tiered group structure with descending daily hiring priorities. The group structure also determines priority for filling regular situations as they become vacant.

The group I list has shaping priority at each shift and is limited to men who once held a regular situation in the industry. The group II list is an aggregate industry-wide list consisting of all regular situation holders and group I shapers. It has daily hiring priority after each employer's group I list is exhausted at a given shift. Persons in group II can use their group II status to obtain extra work with employers other than their own within the industry.

Each employer also maintains a group III list which has shaping priority after all men in groups I and II are put to work. Group III shapers, whose members include both the plaintiff minority workers and the intervenors in this action, are those men who have never held a regular situation anywhere in the industry. Group IV shapers work only after the group III list is exhausted and are only required to shape occasionally.

No group III shaper had achieved regular situation and union membership since 1963. Of the 2,855

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persons who are actively working in the industry, only 70, or approximately 2%, are minority persons.[3] Most of the 272 persons on the group III lists are employed by two major newspapers. Thirteen of the 178 group III members at the New York News are minority persons as are six of the 34 at the New York Times.

B. The Settlement Agreement

In approving the settlement agreement the district court found that the nepotistic policy of the union prior to 1952 resulted in discrimination against minorities (Pet. App. 29a). In fact, the court noted that the effect of the union's policies was to "foreclose minorities from employment in the industry" (Pet. App. 29a).[4] The court also found that the group structure instituted in 1952, although apparently neutral, had been circumvented by friends and family of union members, and had operated to lock in minorities at the non-union entry level and thereby to perpetuate the impact of past discrimination against them in violation of Title VII (Pet. App. 31a). To rectify this present impact the court ap-

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[3] As used herein and in the agreement, minority means Black, Spanish-surnamed, Oriental or American Indian males.

[4] The Court of Appeals noted that "[a]side from the chilling effect which restriction of Union membership to whites might by itself have upon minority persons seeking delivery work, there is evidence that minorities were also discouraged from gaining entrance to Group III lists, even though Group III shapers are not members of the union" (Pet. App. 6a).

proved the affirmative relief embodied in the settlement agreement.

The salient provisions of that agreement are:

1) A goal of 25% minority employment in the industry to be met by June 1, 1979. Until that goal is achieved, employers shall hire, at the entry level, three minority persons for every two non-minority person (Pet. App. 32a; 33a).

2) The contract provision which restricts group I membership to former regular situation holders is eliminated (Pet. App. 33a).

3) Minorities presently active on the group III list at the News and the Times will move immediately to the bottom of the group I list, with an equal number of non-minorities to follow them into the group I list (Pet. App. 33a).

4) Group III shapers shall move in an orderly flow—alternating one minority with one non-minority—into steady and secure employment in the industry, first as members of group I, and then, as regular situations become vacant, to regular situations (Pet. App. 33a).

5) Voluntary transfers from one employer to another are eliminated as barring the advancement of group III shapers into permanent regular situations (Pet. App. 7a).

6) An administrator will supervise the plan and insure that work opportunities will be made available to any group III person who is unable to get 45 shifts of work within a calendar quarter (Pet. App. 36a).

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7) Minority group III members will be awarded pension benefits that they would have earned absent discrimination against them (Pet. App. 33a).

8) Incumbent minority employees will share in a $5,000 back pay fund (Pet. App. 34a).

ARGUMENT

Petitioners' attacks on the validity of the settlement agreement as affecting their rights are fully answered in the opinion of the district court (Pet. App. 21a-43a) and the opinion of the court of appeals (Pet. App. 1a-20a). As both courts pointed out, petitioners, who are white non-union employees (group III shapers), receive substantial benefits under the terms of the settlement agreement. For the first time petitioners have a realistic expectation of advancement to a regular situation in the industry and to union membership. Indeed, they are virtually assured of such advancement within a short period of time (Pet. App. 16a).[5] In addition, petitioners receive other substantial benefits that they never enjoyed before, such as seniority over persons transferring to the group I list from another employer, a promotion rate of one position in seniority

[5] The district court noted that petitioners have previously attacked the union's abuses and practices in other forums and under different statutes to no avail (Pet. App. 35a). Thus, this Title VII action by and on behalf of their minority coworkers provides petitioner-intervenors with the relief from union nepotism and cronyism which they have long sought on their own account.

in group I for each regular situation filled, and the protection provided by an impartial administrator who will insure that work opportunities are made available to group III members.

The agreement provides certain additional relief to minority group II members, including immediate promotion to the group I list for nineteen incumbent minorities in group III, and a one-for-one minority to non-minority flow from group III shaper status to group I. This relief is justified because minorities have been effectively foreclosed from gaining group I status and regular situation positions in the industry even though there are no special skills required to fill the jobs involved. This relief is designed to eliminate the effects of past unlawful discrimination by proceeding towards a representation of minorities in the news delivery industry consistent with their strength in the relevant population. Less vigorous remedial measures such as that suggested by petitioner—promotion from group III strictly along lines of seniority—would fail to promptly neutralize the effects of long-standing and statutorily proscribed discriminatory employment policies.[6]

Petitioners' argument that they should receive the identical relief as minority workers mistakes the re-

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[6] As the district court recognized, minorities have been so impeded from obtaining jobs in the industry—they are presently 2% of the industry and are only 19 of the 212 employees on the group III lists of the News and Times—that hiring minorities in substantial numbers is crucial to breaking the white profile of the industry (see Pet. App. 30a; 31a; 39a).

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medial thrust of Title VII (see Pet. Br. 11-12). That statute prohibits discrimination on the basis of specifically enumerated characteristics, amongst which are race and national origin. It does not prohibit all employment policies which are arbitrary or unfair to workers, but is addressed to those policies which have a negative impact on Title VII protected classes. Although petitioners as individuals have suffered the effects of the union's nepotism, their class (whites) has not been foreclosed from employment opportunities in the industry, nor have they suffered the same diminished expectations for advancement as their group III minority counterparts (Pet. App. 7a; 16a-17a; 29a).

Contrary to petitioners' assertions (Pet. Br. 11-12), *United States* v. *Roadway Express, Inc.*, 457 F.2d 854 (C.A. 6), does not stand for the proposition that previously disadvantaged blacks and whites *must* be afforded the same relief. The Court in *Roadway* held only that a district court acted within its equitable discretion in entering a consent order providing relief for white as well as black city truck drivers under circumstances where white city drivers had been denied the right to transfer to more lucrative over-the-road driving jobs only as a necessary part of the company's refusal to permit blacks to transfer to those jobs.

The lower court here did much the same as the *Roadway* court. Although not required to do so, it elected to extend substantial relief to petitioners as well as to Title VII minority discriminatees.

Petitioners' argument that the settlement agreement permits bumping of employees who have vested seniority rights is inaccurate, as the appellate court in this action recognized (Pet. App. 15a). Petitioners—white, non-union workers—retain their positions and are not delisted. As group III workers, they do not have and have never had seniority rights which assure them of steady employment. They merely compete for a limited quantity of work, the amount of which fluctuates greatly on a day to day basis. Accordingly, the actual impact of the decree on their employment expectations is difficult to gauge. Moreover, any adverse impact will be of relatively short duration (see Pet. App. 16a) and is further mitigated by the new benefits and protections established by the decree.

Finally, the additional relief afforded to minority co-workers, which the court and the parties deemed essential to eliminating racial discrimination in the industry, is not contrary to the expressed will of Congress in enacting Section 703(j) of Title VII. Section 703(j) was meant to bar preferential treatment of minorities as a means of changing racial imbalance attributable to causes other than unlawful discriminatory conduct. It does not prohibit affirmative action to eradicate the effects of past discriminatory practices. *Rios* v. *Enterprise Association Steamfitters Loc. 638 of U.A.*, 501 F.2d 622, 630 (C.A. 2). *Accord: United States* v. *Ironworkers, Local 86*, 443 F.2d 544, 553-554 (C.A. 9), certiorari denied, 404 U.S. 984; *Contractors Assn. of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (C.A. 3),

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certiorari denied, 404 U.S. 854; *United States* v. *IBEW, Local 38*, 428 F.2d 144, 149-150 (C.A. 6), certiorari denied, 400 U.S. 943.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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Equal Employment Opportunity Commission.

I authorize the filing of this brief.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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In The

Supreme Court of the United States

October Term, 1975

No. 75-155

JAMES V. LARKIN, DOMINICK VENTRE, FRANK CHILLEMI, GERALD KATZ, ET AL.,

Petitioners,

vs.

JOHN R. PATTERSON, NEWSPAPER AND MAIL DELIVERERS UNION OF NEW YORK AND VICINITY, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NEW YORK DAILY NEWS, NEW YORK TIMES, ET AL.,

Respondents.

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QUESTIONS PRESENTED:

1. In an action based on Title VII, where both minority and non-minority workers are subjected to identical employment discrimination, is a District Court prohibited from granting equal relief to all discriminatees, regardless of race?

2. Whether Congress intended through Title VII to grant constructive seniority to newly hired minority individuals to the detriment of incumbent non-minority employees?

ARGUMENT

Reply to Brief in Opposition to Certiorari

When non-minority workers are subjected to the same unfair treatment as minorities, are they also entitled to the same relief? This is the issue presented for review. It affects every employee in our nation whose industry is governed by a Title VII affirmative action program.

Both black and white non-union workers were victims of identical discriminatory employment practices (Brief In Opposition To Certiorari page 4—Op. Br. p. 4; Petition For A Writ Of Certiorari 35a). Yet, Respondents have argued that under Title VII equally discriminated against white workers have no right to receive relief equal to that afforded minorities. They further maintain that *new* as well as incumbent minority workers must be given preferential treatment at the expense of these very same white discriminatees (Op. Br. p. 5).

This approach to the resolution of employment discrimination was never the intention of Congress or the Judiciary in the enactment, interpretation or implementation of Title VII.

In their Brief in Opposition to Certiorari, the Respondents have advanced positions which are in direct conflict with their statements in the record below. For example, Respondents would have

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this Court believe that this appeal is being advanced by a single petitioner (Op. Br. p.6). They neglect to note that when this particular petitioner sought class certification in the District Court, Respondents opposed the motion arguing:

> "... class action intervention serves no purpose not well protected by allowing, as the Court has done, intervention on an individual basis. ... The Court should deny Intervenor Larkin's motion to proceed on a class-wide basis, without restricting him from advancing arguments which he believes to be in the interests of other persons on the News' Group III list."

Furthermore, an application for a stay was made in the Court of Appeals (Op. Br. p.6). Respondents opposed this motion stating *inter alia* that there would be no irreparable harm to the Petitioners. Chief Judge Kaufman in denying the motion for a stay observed that if on appeal the Petitioners were successful, then employment priority lists could be revised and non-minority employees compensated for any financial loss.

Respondents cite several cases in support of the obvious statement that an affirmative cause of action is created under Title VII to remedy employment discrimination (Op. Br. p.7). Not one case stands for the proposition that equally mistreated workers should be denied equal remedial relief by a Court of Equity whose jurisdiction has been invoked under Title VII.

Petitioners are not challenging the affirmative action program which establishes quotas at entry level hiring (Op. Br. p. 8). At issue herein are those provisions of the affirmative action program which grant fictional seniority to newly hired minority workers to the detriment of white workers who have also been victims of the same employment discrimination. There has never been a judicially sanctioned affirmative action program wherein non-minority discriminatees have been denied equal relief.

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Finally, acknowledging that the Petitioners' seniority rights, etc., have been interfered with, the Respondents seek to justify their action upon the ground that a labor agreement could be modified by the Union and Employer (Op. Br. p. 9). However, a labor agreement predicated upon racial considerations is not permissible under Title VII.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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